

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

NICOLA KEMP,

Defendant-Appellant.

UNPUBLISHED

January 17, 2012

No. 300948

Wayne Circuit Court

LC No. 10-006882-FH

Before: DONOFRIO, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Defendant appeals as of right her bench trial conviction of felonious assault, MCL 750.82. Because defendant was not denied the effective assistance of counsel, the trial court's factual findings were sufficient, and defendant is not entitled to a new trial based on the admission of perjured testimony, we affirm.

Defendant's conviction arises from an incident during which she admittedly cut Peter Anderson's arms with a razor blade contained in an eyebrow archer, causing injuries that required numerous stitches. The assault occurred while Anderson, who worked "security" at an afterhours club, was escorting defendant and her group of friends out of the club following a fight. At trial, defendant claimed that she cut Anderson in self-defense because he was choking her, while Anderson testified that defendant was the aggressor and cut him as he was escorting her out of the club. The trial court credited Anderson's account of the incident and convicted defendant of felonious assault.

Defendant first argues that she is entitled to a new trial because her attorney rendered ineffective assistance of counsel. Defendant preserved her argument for our review by raising it in a motion for a new trial or *Ginther*¹ hearing, which the trial court denied. *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000). To establish ineffective assistance of counsel, a defendant must show that (1) counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and (2) a reasonable

¹ *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

probability exists that, absent counsel's errors, the outcome of the proceeding would have been different. *Id.* at 659. A defendant must overcome a strong presumption that counsel's performance constituted sound trial strategy. *Id.* Further, counsel's performance must be measured without the benefit of hindsight. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009). Because the trial court denied defendant's motion for a *Ginther* hearing, our review is limited to mistakes apparent on the record. *Id.* at 188.

Defendant's ineffective assistance of counsel claim is based on her trial counsel's stipulation to the admission of Robert Lyons's police statement. Lyons, a security guard at the scene, gave a statement to the police, which tended to corroborate Anderson's testimony that defendant was the aggressor and did not act in self-defense. We agree with defendant that the admission of Lyons's statement violated her constitutional right to confront Lyons, a witness against her.² "The Confrontation Clause of the Sixth Amendment bars the admission of testimonial hearsay unless the declarant is unavailable and the defendant has had a prior opportunity for cross-examination." *Payne*, 285 Mich App at 197. Here, Lyons was apparently unavailable for trial, and defendant never had a prior opportunity to confront and cross-examine him. Thus, the Confrontation Clause barred the admission of his police statement, which was a testimonial statement, the primary purpose of which was "to establish or prove past events potentially relevant to later criminal prosecution." *Davis v Washington*, 547 US 813, 822; 126 S Ct 2266; 165 L Ed 2d 224 (2006). By stipulating to the admission of Lyons's police statement, defense counsel effectively waived defendant's constitutional right to confront him, thereby rendering assistance that arguably fell below an objective standard of reasonableness.³

Notwithstanding the alleged deficiency in counsel's performance, relief is not warranted because defendant failed to demonstrate a reasonable probability that the trial court would have reached a different verdict had Lyons's statement been excluded from evidence. The factual questions in this case turned on the credibility of the witnesses, and we must defer to the trial court's superior opportunity to evaluate witness credibility. *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). The trial court credited Anderson's account of the incident and found incredible defendant's claim of self-defense. The court's credibility assessment was reasonable in light of Anderson's forthcoming and potentially incriminating testimony, in which he admitted kicking, hitting, and threatening to kill defendant after she cut him. This testimony suggests that Anderson was being truthful regarding the circumstances of the assault, and defendant's inconsistent accounts of the incident called into question her trustworthiness. In fact, the record shows that the trial court strongly believed that defendant did not act in self-defense. In denying defendant's motion for a new trial, the court stated that it did not have any doubt about defendant's guilt and characterized Lyons's police statement as "icing

² A defendant has a constitutional right to confront the witnesses against her. US Const, Am VI; Const 1963, art 1, § 20; *People v Chambers*, 277 Mich App 1, 10; 742 NW2d 610 (2007); *People v Jambor (On Remand)*, 273 Mich App 477, 486; 729 NW2d 569 (2007).

³ Because the record does not reveal defense counsel's reasoning for stipulating to the admission of Lyons's statement, we cannot ascertain whether counsel's decision constituted sound trial strategy.

on the cake.” Thus, it is clear from the record that Lyons’s statement was not a determining factor in the court’s decision to convict defendant. We therefore conclude that defendant has failed to demonstrate a reasonable probability that the trial court would have reached a different verdict had Lyons’s police statement been excluded from evidence. See *Sabin*, 242 Mich App at 659. Defendant’s ineffective assistance of counsel claim accordingly fails.

Defendant next argues that she is entitled to a new trial because Anderson committed perjury regarding the nature of the club at which the incident occurred. Defendant raised this issue in a motion for a new trial, which the trial court denied. We review the court’s decision for an abuse of discretion. *People v Mechura*, 205 Mich App 481, 483; 517 NW2d 797 (1994). An abuse of discretion occurs when the trial court chooses an outcome that falls outside the range of principled outcomes. *People v Schaw*, 288 Mich App 231, 236; 791 NW2d 743 (2010).

“The discovery that testimony introduced at trial was perjured may be grounds for a new trial.” *Mechura*, 205 Mich App at 483. “In order to merit a new trial on the basis of such a discovery, a defendant must show that the evidence (1) is newly discovered, (2) is not merely cumulative, (3) would probably have caused a different result, and was not discoverable and producible at trial with reasonable diligence.” *Id.*; see also *People v Cress*, 468 Mich 678, 692; 664 NW2d 174 (2003) (setting forth the same factors to warrant a new trial based on newly discovered evidence).

Defendant contends that, during Anderson’s testimony, he portrayed himself as a security guard at a “private social club” that did not serve alcohol, when, in actuality, he was a “security thug” at his brother’s “blind pig.” To support her perjury claim, defendant attached to her motion for a new trial a Detroit News article published after her conviction, which stated that Wayne County Sheriff’s officials believed that the club was operating as a “blind pig and brothel” and would ask prosecutors to file charges against the owner of the club. Defendant offered the news article to impeach Anderson’s testimony that the establishment was an afterhours social club rather than a “blind pig.” The use of the news article merely to impeach Anderson’s testimony, however, does not warrant a new trial. See *People v Davis*, 199 Mich App 502, 516; 503 NW2d 457 (1993) (“Newly discovered evidence is not [a] ground for a new trial where it would merely be used for impeachment purposes.”).

Further, it is evident from the record that the nature of the club was not relevant to the trial court’s decision. When it rendered its verdict, the court stated that whether the club is an “after hours drinking establishment” or a “blind pig” did not “really matter[] much in the final analysis[.]” Similarly, in denying defendant’s motion for a new trial, the court stated that whether the establishment is a “blind pig” is a “non[] issue” and that the court was aware of “the nature of the place” despite Anderson’s testimony. Thus, the record shows that the court would not have reached a different verdict had evidence of Anderson’s perjury been admitted during trial. *Mechura*, 205 Mich App at 483. Moreover, whether the club was operating as “blind pig” was readily discoverable at the time of trial. Numerous persons were at the establishment on the night in question who could have testified regarding the nature of the club. Thus, the trial court did not abuse its discretion by denying defendant’s motion for a new trial based on the admission of perjured testimony. *Id.*

Finally, we reject defendant’s argument that the trial court’s findings were inadequate. It is apparent from a review of the record that the trial court was aware that Anderson was not

completely forthcoming regarding the nature of the club, but found the issue immaterial to whether defendant committed felonious assault. The court's factual findings indicate that it was aware of the issues and correctly applied the law. See *People v Legg*, 197 Mich App 131, 134; 494 NW2d 797 (1992). Further, remanding this case to the trial court for additional fact finding would not facilitate appellate review. *Id.* at 134-135.

Affirmed.

/s/ Pat M. Donofrio
/s/ Cynthia Diane Stephens
/s/ Amy Ronayne Krause